85-1492

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1985

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delaware Corporation,

Petitioner,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida corporation and P.H. DOYLE, JR.,

Respondent.

ON PETITION FOR CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.

Plaintiff,

vs. CASE NO. 81-500
Civ-T-WC

DOYLE ELECTRIC COMPANY, INC.
et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on Plaintiff's Motions for Summary Judgment on the Complaints and Counterclaim and Defendants' Motion for Summary Judgment on Count I of the Counterclaim. The Court heard argument of the parties on March 18, 1983. Subsequent to the hearing Plaintiff submitted the Affidavit of Donald D. Cookson in support of its motions and Defendants filed a memorandum in reply to that Affidavit.

This case concerns the obligations of Defendant Doyle Electric Co. to make payments on an equipment lease to Plaintiff Borg-Warner Leasing and the obligation of Defendant P.H. Doyle, Jr. under a guaranty agreement allegedly executed in connection with the lease transaction. The lease, signed by Doyle on October 17, 1978, essentially was a means for Doyle Electric to finance the purchase of a Burroughs computer. Doyle and Burroughs agreed that Burroughs would sell the computer equipment to Borg, which in turn would lease the equipment to Doyle and assign all of Burroughs' warranties to Doyle. Because the computer was allegedly defective, Doyle ceased making lease payments in September, 1979 but retained the equipment. Borg-Warner brought suit against Doyle Electric for breach of the lease agreement and against P.H. Doyle, Jr. for breach of the personal guaranty.

The Court concludes that, under Rule 56(c), Federal Rules of Civil Procedure, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact" and that Plaintiff is entitled to Summary Judgment as a matter of law on all claims.

As to Count I of the main claim, the corporate Defendant has admitted to executing the lease agreement and has also admitted breaching the lease agreement by failure to make payments due and owing from September, 1979. Therefore, no genuine issue of material fact remains as to the corporate defendant's liability for breach of the lease agreement. Although Defendant urges in Count I of the Counterclaim that the lease agreement should be rescinded

because it attempts to disclaim all express and implied warranties and thus is a contract of adhesion, void as unconscionable, the Court finds this claim totally without merit. Defendants' contention that Borg-Warner breached the contract by failing to provide suitable equipment for Defendants' needs is likewise without merit. As clearly evident from the lease agreement, Borg-Warner's contractual duty was to lease Defendants equipment that Defendants had chosen; nothing in the record suggests that Plaintiff owed Defendants a duty to choose or provide equipment appropriate for Defendants' needs.

Counts II and III of the Counterclaim are based on Defendants' contentions that the lease was in fact a sale and that Borg-Warner breached implied warranties of merchantability and of fitness for a parti-

cular purpose. Even assuming the transaction was a sale rather than a lease, these arguments would fail. First, the contract itself imposed no duty upon Plaintiff to choose equipment of any kind for Defendant. Thus, Plaintiff could in no way have warranted that equipment it sold was fit for any particular purpose, especially since nothing in the record suggests that the Defendants relied on Plaintiff's skill and judgment in choosing the equipment. Second, as Plaintiff points out, the issues of whether the transaction was a sale or a lease and whether Plaintiff has breached its implied warranty of merchantability are rendered moot by Plaintiff's legally effective disclaimer appearing on the face of the contract. Earman Oil Co. v. Burroughs Corporation, 625 F.2d 1291 (5th Cir. 1980). Thus, any possible issues concern-

ing whether the transaction was a sale or a lease and the applicable warranties arising simply are not "genuine issues of material fact."

At the hearing on this matter the primary issue presented was the legal effect of the personal guaranty agreement, the subject of Count II of the Complaint. The Court has examined the record and finds as a matter of law that Frank T. Myers was not an agent of Borg-Warner. Mr. Myers testified in his deposition that he was a leasing broker whose job was to set up financing for customers. In this case Burroughs, from whom Doyle wished to obtain the equipment, contacted Myers and asked him to contact Doyle. Defendants can point to nothing in the record to suggest that Mr. Myers' position was one on which Mr. Doyle could have or should have relied as a

representative of Borg-Warner. No representations by Myers to Doyle could bind Borg-Warner, and therefore Doyle's defenses of fraudulent misrepresentation and duress as to the Count II claim on the personal guaranty agreement are legally insufficient.

Defendants contend that there exists a genuine issue of material fact as to whether Mr. Doyle received any consideration for signing the guaranty and waiver agreement. They argue that Mr. Myers represented to Mr. Doyle that the guaranty agreement did not apply to the lease transaction that is the subject of this litigation but instead was applicable to future transactions. The guaranty agreement contains no such limitations and Mr. Myers testified to the contrary in his deposition. He stated that he told Mr. Doyle that Borg-Warner simply would not accept

the lease agreement without Mr. Doyle's signature on the guaranty agreement. Although these statements by Mr. Myers and Mr. Doyle are in direct conflict, they do not create an issue of material fact because Mr. Myers' statements could not legally bind Borg-Warner or affect the terms of its written agreement with Doyle.

Defendants also contend that, because there was an apparent discrepancy of one week between Plaintiff's signing of the lease and signing of the guaranty, Mr. Doyle received no consideration for the guaranty. In Florida, "the law is clear that where the promise of a guarantor is shown to have been given as part of a transaction that included the creation of the guaranteed obligation, the consideration supporting the obligation will also support the contract of guaranty." Von

Dunser v. Southeast First National Bank of Miami, 367 So.2d 1094, 1095 (Fla. 3rd DCA 1979). Defendants essentially contend that the dates on the face of the lease and guaranty agreements establish that the documents were not executed as part of one transaction, so the consideration given for the lease could not legally suffice as consideration for the guaranty. Although the lease is dated October 17, 1978 and the testimony of Mr. Doyle is unrebutted that he signed the lease on that date, the only testimony in the record concerning when Borg-Warner's representative signed and thereby accepted the lease is that of Donald D. Cookson, Borg-Warner's Branch Manager. In an Affidavit Mr. Cookson stated that the Assistant Manager of his office did not approve all of the supplementary documents or accept the lease until

November 2, 1978. In an earlier answer to an interrogatory Mr. Cookson had stated that the lease "application was subsequently processed and ultimately accepted on October 24, 1978." Although there is some discrepancy from Mr. Cookson's testimony as to the date of the acceptance, that discrepancy is not material because the only reasonable inference that can be drawn from both statements is that the lease was not accepted before October 24, 1978, the date on which Mr. Doyle signed the guaranty agreement. Defendants have pointed to nothing in the record that would cause the Court to conclude anything other than that the lease was signed and accepted on or after the date Mr. Doyle signed the guaranty agreement and therefore both documents were executed as part of a single transaction. The Court concludes as a matter of

law that there existed legally sufficient consideration for Mr. Doyle's signature on the guaranty agreement and Plaintiff is entitled to Summary Judgment on Count II of the Complaint. It is, therefore,

ORDERED:

1. Plaintiff's Motions for Summary Judgment on the Complaint and the Counterclaim will be granted.

2. Defendants' Motion for Summary Judgment on Count I of the Counterclaim is denied.

3. Summary Final Judgment will be entered in favor of Plaintiff Borg-Warner Leasing and against Defendants Doyle Electric Company, Inc. and P.H. Doyle, Jr.

4. Plaintiff shall file with the Court, within twenty days of the date of this Order, affidavits as to the total sums currently due to Plaintiff under the lease

and guaranty agreement executed by Defendants. If the Defendants do not agree with the amounts set forth in Plaintiff's affidavits, Defendants shall, within twenty days and without prejudice to their right of appeal, file counter-affidavits setting forth their calculations of the amounts due Plaintiff under the lease.

5. This cause is removed from the trial calendar.

DONE AND ORDERED at Tampa, Florida this 1st day of April, 1983.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.

Plaintiff,

vs. CASE NO. 81-500
Civ-T-WC

DOYLE ELECTRIC COMPANY, INC., et al.,

Defendants.

FINAL SUMMARY JUDGMENT

The Court, having entered its Opinion and Order on April 1, 1983 directing that Summary Judgment would be entered in favor of Plaintiff Borg-Warner Leasing and against Defendants Doyle Electric Company, Inc. and P.H. Doyle, Jr., now has for consideration the Plaintiff's Affidavit in Support of Final Summary Judgment, Defendants' Reply to Affidavit in Support of Final Summary Judgment, and Plaintiff's Response to Defendants' Response.

The parties do not dispute the following calculations:

Forty-eight unpaid monthly lease payments at $874.66 each	$41,983.68
Property taxes under the terms of the lease	1,451.10
Late charges in accordance with the terms of the lease	3,371.14

At dispute are two additional items. Plaintiff claims that it was able to give Defendants a reduced rate on the lease by passing through the Defendants a savings in the amount of an investment tax credit. After Defendants fell behind in their payments, however, Plaintiff had to write off the lease and thereby lost the benefit of the investment tax credit. This amount was $4,930.74. Plaintiff claims that it is now entitled to assess this amount as an item of damage against Defendants under para-

graph 7 of the lease, which provides that "Lessee shall pay all charges and local, state and Federal taxes (and reimburse Lessor for any such payments made by Lessor)." That paragraph states that Defendant is liable to Plaintiff for taxes paid; subsequent loss of a tax credit cannot be construed as a "tax paid." Therefore, the Court finds that the lease agreement does not obligate Defendants to pay for the Plaintiff's claimed lost tax credit.

Also disputed is the amount of rental tax due. The Court has examined the calculations submitted by both parties and finds that Plaintiff, in its Response to Defendants' Reply, has correctly calculated this amount. Thirty-two payments were taxable at the prior 4% rate. In 1982, Section 212.05, Florida Statutes, was amended. Transactions occurring after May

1, 1982 are taxable at the 5% rate. Therefore, 16 payments due after May 24, 1982 are taxable at 5%. The total rental tax due is:

4% on each of 32 unpaid payments of $874.66	$1,119.56
5% on each of 16 unpaid payments of $874.66	699.73
	$1,819.29

The total amount of damages due Plaintiff from Defendant is $48,625.21.

Therefore, it is

ORDERED:

1. Final Summary Judgment is entered in favor of Plaintiff Borg-Warner Leasing and against Defendants Doyle Electric Company, Inc. and P.H. Doyle in the amount of $48,625.21, together with costs, for all of which sums let execution issue.

DATED at Tampa, Florida this 19th day of May, 1983.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3501

BORG-WARNER LEASING, a Division of
BORG-WARNER ACCEPTANCE CORPORATION,
a Delaware Corporation,

Plaintiff-Appellee,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida
corporation and P.H. DOYLE, JR.,

Defendants-Appellants.

Appeal from the United States District
Court for the
Middle District of Florida

(June 4, 1984)

Before FAY, VANCE and HATCHETT,
Circuit Judges.

VANCE, Circuit Judge:

In this Florida diversity action the Doyle Electric Company and P.H. Doyle, Jr., its president, challenge the district court's grant of summary judgment for Borg-Warner Leasing(1). We affirm as to Doyle Electric and reverse as to Doyle.

In 1978 Doyle contacted the Burroughs Corporation on behalf of his company with an eye to obtaining a Burroughs B-80 computer. Preferring a lease to outright purchase, Doyle arranged to have Burroughs sell the computer to Borg-Warner, which in turn contracted to lease the equipment to

1. Throughout this opinion we shall refer to the company as "Doyle Electric", to its president as "Doyle", and to Borg-Warner Leasing as "Borg-Warner".

Doyle Electric with an option to purchase. The computer was installed but never functioned properly, prompting Doyle Electric to suspend lease payments. Borg-Warner in turn sued the company for breach of contract. Later Borg-Warner added Doyle as a party defendant based on a personal guaranty he had executed. Doyle Electric counterclaimed for rescission and cancellation due to failure of consideration and unconscionability. The court below entered summary judgment for Borg-Warner on both the original claims and the counterclaim. This appeal followed.(2)

2. Borg-Warner, a Delaware corporation, originally sued Doyle and Doyle Electric, both Florida citizens, in Florida state court. Doyle Electric proceeded to file a third party claim for indemnity against Burroughs, a Massachusetts corporation. Burroughs successfully petitioned for removal of the entire case on the basis of diversity. The federal district court later

dismissed the claim against Burroughs for failure to state a claim for indemnity.

We note that Borg-Warner's initial claims against Doyle and Doyle Electric were not removable because those defendants were citizens of the state in which the action was brought. 28 U.S.C. sec. 1441(b). The third party claim against Burroughs would have been removable if sued upon alone. Under 28 U.S.C. sec. 1441(c), removal of the entire case was proper only if the impleaded claim was separate and independent of the original action.

This case raises a serious question whether the indemnity claim against Burroughs was separate and independent of the original contract claims so as to warrant their removal. See 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure sec. 3724, at 645-46 (1976); 1A J. Moore & B. Ringle, Moore's Federal Practice, paras. 0.163[4.-6], 0.167[10] (1983). We do not believe that Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980), is dispositive because that case involved the propriety of removing a diverse third party indemnity claim which the federal district court had retained after remanding the original, nondiverse action. The panel in Carl Heck did not have to reach the more difficult question whether the original

Appellants raise two issues: (1) whether Doyle as a matter of law is liable on the personal guaranty; (2) whether the facts as a matter of law preclude the existence of failure of consideration and unconscionability.

We note initially that Borg-Warner, as the party seeking summary judgment, bore the burden of showing the absence of a

action itself would have been removable since the lower court had remanded the original action to state court. Nor need we address this issue since any error that occurred was a technical flaw that did not go to the subject matter juridsiction of the court. Because Borg-Warner's action fell within the original diversity jurisdiction of the federal district court, the procedural defect under the removal statute was waivable by the parties. Monroe v. United Carbon Co., 196 F.2d 455 (5th Cir. 1952); see Grubbs v. General Electric Credit Corp., 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). We conclude that waiver occurred since this case proceeded without objection to consideration on the merits.

genuine issue as to any material fact. For purposes of review we must consider the facts as adduced in the affidavits, admissions, and deposition excerpts submitted in connection with the summary judgment motion in the light most favorable to the opposing party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). With these principles in mind, we turn to the effectiveness of the personal guaranty.

Once Doyle selected the computer that seemed best suited to his company's needs, Burroughs agreed to locate someone who could arrange a lease. Soon afterward Doyle heard from Frank T. Myers, a leasing broker. Myers first interviewed Doyle to determine Doyle Electric's requirements. He then broached the matter of a lease with Borg-Warner. Borg-Warner, which was agree-

able, prepared a purchase option and a standardized lease agreement imprinted with the Borg-Warner name for signature by Doyle Electric. It also drew up a personal guaranty for Doyle to sign in his individual capacity. Borg-Warner instructed Myers to present the documents to Doyle for signature. Doyle signed the lease on behalf of Doyle Electric on October 17, 1978. Myers' attempts to persuade Doyle to guarantee the lease in his individual capacity, however, met with adamant refusal.

The Computer was installed two days later, on October 19. On October 24 Myers renewed his efforts to persuade Doyle to sign the guaranty. Doyle finally agreed to do so. In a subsequent affidavit Doyle stated that he signed only because Myers assured him that the guaranty would have solely prospective effect and that it thus

would not relate back to the October 17 lease. Myers gave a different account in deposition. According to the broker, he told Doyle that Borg-Warner would not sign the lease unless Doyle gave his personal guaranty. The guaranty itself is silent. Borg-Warner executed the lease shortly after Doyle acceded to Myers' requests.

Myers was an independent broker, as Doyle realized by the time he signed the guaranty. As a broker, Myers served as a conduit to a number of competing computer leasing firms. One such firm was Borg-Warner. In the negotiations that culminated in the guaranty Doyle dealt exclusively with Myers and thus had no direct contact with the leasing company. Borg-Warner later paid Myers a finder's fee for his services.

Doyle raised fraud in the inducement as one of his defenses to liability on the personal guaranty. On appeal he argues that summary judgment was improper because the facts regarding the effect of the guaranty remain in dispute. To reach this contention, however, we must first conclude that a genuine issue of material fact exists as to whether Myers was Borg-Warner's agent for the purpose of any representations that might have been made.

The trial cout discerned no evidence that Myers was Borg-Warner's agent with authority to bind that company. Our examination of the Florida law governing agency, which controls this diversity case, compels a different conclusion. Under Florida law, actual authority is not necessarily a precondition of an agency relationship. Under the doctrine of apparent authority, an

agency will arise when the principal allows or causes others to believe that an individual has authority to conduct the act in question, inducing their detrimental reliance. Fidelity & Casualty Co. v. D.N. Morrison Construction Co., 116 Fla. 66, 156 So. 385, 387 (1934); City National Bank v. Basic Food Industries, Inc., 520 F.2d 336, 337 (5th Cir.1975). Contrary to Borg-Warner's contentions, apparent agency can arise even in the face of the principal's silence when the principal by its actions creates a reasonable appearance of authority. See, e.g., Stiles v. Gordon Land Co., 44 So.2d 417, 421-22 (Fla.1950).

Under Floria case law, a question of agency is reserved to the trier of fact when resolution of the issue depends on the inferences to be drawn from the facts adduced. Amerven, Inc. v. Abbadie, 238

So.2d 321, 322 (3d Fla.App.1970); see also Adickes, 398 U.S. at 158-59, 90 S.Ct. at 1608-09. We conclude that this is such a case. Borg-Warner entrusted Myers with forms bearing the Borg-Warner imprint and instructed him to obtain Doyle's approval. Throughout the contract negotiations Myers was Doyle's sole point of contact with the company. Borg-Warner does not deny that it vested Myers with aughority to persuade Doyle to sign the guaranty. Although Borg-Warner never informed Doyle that Myers was its agent, a trier of fact could reasonably conclude Borg-Warner gave that impression by appointing Myers as the bearer of its letterhead documents and as the exclusive negotiator of its demands. See Lumbermens Mutual Casualty Co. v Savigliano, 422 So.2d 29, 31 (4th Fla.App. 1982); Russell v. Eckert, 195 So.2d 617,

621-22 (2d Fla.App. 1967). That Doyle knew Myers was an independent broker does not alter the outcome. A broker can become an agent when the principal creates the reasonable appearance of authority. Montone v. Bush, 167 So.2d 884 (2d Fla.App.1964).

In response, Borg-Warner argues that, even if the facts support a finding of agency, Doyle's defense must fail because the record contains no evidence that Doyle relied to his detriment on Myers' alleged representations. Doyle testified, however, that he agreed to sign the guaranty only because Myers promised that Borg-Warner would apply the guaranty solely to future business dealings and not to the lease at hand. This testimony sufficed to create an issue of fact with respect to reliance.

We conclude that the question whether Myers was Borg-Warner's agent for purposes of the guaranty raises a genuine issue of material fact not amenable to summary judgment. Because a dispute thus remains as to the existence of an agency relationship and the promised effect of the guaranty, we reverse the trial court's order of summary judgment against Doyle and remand.

Doyle Electric's efforts to revive its counterclaim merit only brief discussion. Under the terms of the standardized lease agreement, Borg-Warner rented the computer "as is" and disclaimed all warranties, express and implied. Thus, Doyle Electric remained obligated to pay rent even though the computer failed to operate properly. Doyle Electric asserts that summary judgment was improper because the warranty disclaimers and the rent provision create

issues of fact whether failure of consideration or unconscionability warrant rescission of the lease.

For purposes of these arguments we see no functional difference between the purchase-option lease involved in this case and a direct purchase from a manufacturer financed by a mortgage. Doyle Electric ignores the fact that Borg-Warner, as the buyer, assigned its warranty rights against Burroughs, the seller, to Doyle Electric. Thus Doyle Electric had the contractual right to assert Borg-Warner's warranty rights against Burroughs. The assignment clause provided consideration for the rent obligation and preserved an adequate remedy for Doyle Electric, precluding unconscionability. It was Doyle Electric rather than Borg-Warner, moreover, who originally selected the computer that failed and who

therefore was better situated to understand its potential defects. Given these circumstances, we conclude that summary judgment was correct and therefore we affirm the judgment of the court below with respect to the counterclaim for rescission.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

BORG-WARNER LEASING, LTD., etc.

vs.

P.H. DOYLE, JR.

81-500-CIV-T-WC

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

/X/ JURY VERDICT. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

/ / DECISION BY COURT. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant, P.H. Doyle, Jr., recover of the Plaintiff, Borg-Warner Leasing, his costs of action.

CLERK: DONALD M. CINNAMOND/ DATE: 10/12/84

(BY) DEPUTY CLERK: /s/ B. Michael M. Lemore

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.	)	
Plaintiff,	)	
vs.	)	CASE # 81-500 CIV-T-WC
DOYLE ELECTRIC COMPANY, INC. and P.H. DOYLE, JR.,	)	
Defendants.	)	

MOTION FOR JUDGMENT
NON OBSTANTE VEREDICTO

COMES NOW, the Plaintiff, BORG-WARNER LEASING, by and through its undersigned counsel and pursuant to Fed.R.Civ.P. 50(b) moves the Court for entry of judgment in its favor not withstanding the verdict of the jury and in support thereof would show:

1. Plaintiff or Plaintiff's agent was alleged to have uttered a false statement regarding the import or effect of a personal guaranty agreement.

2. The said personal guaranty agreement was at Defendant, Doyle's immediate disposal at the time the alleged false statement was made which was also the same time that Doyle signed the guaranty agreement.

3. The written language of the guaranty was in direct and absolute contravention of the substance of the alleged false statement.

4. A necessary element of fraud is that the representee must justifiably rely on the false statement.

5. The jury in the present action found the false representation to have constituted fraud and by special verdict found Defendant Doyle's reliance justifiable.

6. That Defendant Doyle's reliance on the alleged false statement was unreason-

able is a fact upon which reasonable persons could not differ in view of the applicable Florida law.

WHEREFORE, Plaintiff BORG-WARNER LEASING hereby moves the Court for the entry of a Judgment Non Obstante Veredicto.

MEMORANDUM OF LAW

When testifying in the present action, Defendant, P.H. Doyle alleged two facts pertinent to this motion. First, Doyle stated that Mr. Myers told him that the guaranty agreement he was signing would only operate prospectively. Doyle then testified that he signed the guaranty agreement without reading its contents. The misrepresentation was allegedly made contemporaneously with the signing of the personal guaranty.

The evidence also demonstrated that the guaranty agreement contained the following wording in its first paragraph:

> "[Doyle] hereby absolutely guarantees the full and prompt payment of any and every indebtedness, liability or obligation; liability or obligation (howsoever arising and of any nature whatsoever), which may now or at anytime and from time to time hereafter exist or be incurred..."

This language is in direct contravention of Mr. Myers' alleged statement.

Doyle's sole defense at trial was that Mr. Myers was guilty of fraud by virtue of his representation regarding the guaranty agreement. Specifically, Doyle claimed that Mr. Myers' represented that the personal guaranty would only apply to future transactions. The jury agreed with this contention and found that the personal guaranty signed by Doyle was null and void. Among the specific findings of the

jury was an affirmative answer to the question: "Did the preponderance of the evidence demonstrate that Mr. Doyle justifiably relied on Mr. Myers' false representation of a material fact?"

Florida law is clear as to what does and what does not constitute justifiable reliance. In the case of Besett v. Basnett, 389 So.2d 995 (Fla. 1980) the Florida Supreme Court adopted Section 541 of the Restatement (Second) of Torts (1976) along with that section's comment. That section and comment reads as follows:

> The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.
> Comment:
> a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his

> senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

The jury instructions accurately reflected the law in this matter. The jury instruction on this point was as follows:

> "Fourth, the Defendant must prove that he justifiably relied and acted upon the misrepresentations. If, in the exercise of reasonable care for the protection of his own interest, the Defendant could have ascertained the truth of the matter by making a reasonable inquiry or investigation under the circumstances presented, but failed to

do so, then it cannot be said that he "justifiably" relied upon such misrepresentations."

As related above, Mr. Doyle testified that he did not read the guaranty agreement that he signed. The guaranty agreement directly contradicted the Myers' statement. Thus, Mr. Doyle had an opportunity to make a cursory examination that would have disclosed the falsity of Myers' statement but chose not to do so. This fact is not and cannot be contraverted. Obviously, since Doyle actually signed the guaranty agreement a cursory examination of it would have been quite easily performed. A cursory examination, in turn, could not have helped but uncover the falsity of Mr. Myers' statement.

In summation, Mr. Myers made a false statement to Doyle regarding the guaranty agreement. Mr. Doyle signed that same

agreement without reading it. On this the facts are clear and uncontroverted. This set of facts leaves no doubt that Mr. Doyle's reliance on Mr. Myers' statement was unjustified. Mr. Doyle's unjustified reliance is a fact upon which no reasonable person could differ. Thus, this Court should enter judgment in favor of the Plaintiff not withstanding the verdict of the jury. United States v. 329.73 Acres of Land, Etc., 666 F.2d 281 (5th Cir., 1982).

/s/ Paul E. Parrish
PAUL E. PARRISH
DAVID A. TOWNSEND, ESQ.
100 Madison Street
Suite 301
Tampa, Florida 33602
813/228-0148
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been sent by U.S. Mail this 18th day of October, 1984 to: RICK NEILSON, ESQ., P.O. Box 3399, Tampa, Florida 33601.

/s/ Paul Parrish
PAUL PARRISH
DAVID A. TOWNSEND, ESQ.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.,

Plaintiff,

vs. Case No. 81-500-Civ-T-WC

DOYLE ELECTRIC COMPANY, INC., et al.,

Defendants.

O R D E R

The Court has before it the Plaintiff's Motion For Judgment Non Obstante Veredicto. Having considered that Motion and the Defendant's Response thereto, the Court finds no basis for granting the requested relief and the jury's verdict will not be disturbed. Accordingly, it is

ORDERED:

1. Plaintiff's Motion for Judgment Non Obstante Veredicto is denied.

DONE AND ORDERED at Tampa, Florida this 1st day of November, 1984.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-3797

BORG-WARNER LEASING, etc.

Plaintiff-Appellant,

versus

P.H. DOYLE, JR.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(June 27, 1985)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

Plaintiff/appellant Borg-Warner Leasing appeals from the district court's denial of its motions for directed verdict and judgment notwithstanding the verdict, contending that, as a matter of law, defendant-appellee Doyle could not have justifiably relied on an alleged representation as to the effect of a personal guaranty, which representation the jury found to be fraudulent. We do not reach these contentions, determining that the "law of the case" doctrine precludes our consideration of this argument.

"Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case." Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984)

(quoting United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982)); see Westbrook v. Zant, 743 F.2d 764, 768-69 (11th Cir. 1984). This doctrine encompasses both issues explicitly decided in the prior appeal, and issues decided by necessary implication. Wheeler, 746 F.2d at 1440.

In a prior appeal of this case we reversed a grant of summary judgment in favor of appellant, holding that a genuine issue of material fact remained "as to the existence of an agency relationship and the promised effect of the guaranty." Borg-Warner Leasing v. Doyle Electric Co., 733 F.2d 833, 836 (11th Cir. 1984). In so holding, we stated that:

> In response [to Doyle's contentions that Myers was an apparent agent of Borg-Warner], Borg-Warner argues that, even if the facts support a finding of agency, Doyle's defense must fail

> because the record contains no evidence that Doyle relied to his detriment on Myers' alleged representations. Doyle testified, however, that he agreed to sign the guaranty only because Myers promised that Borg-Warner would apply the guaranty solely to future business dealings and not to the lease at hand. This testimony sufficed to create an issue of fact with respect to reliance.

Id.

Our prior decision explicitly determined that the issue of whether Doyle relied on Myers' alleged representation was an issue of fact to be resolved by the jury. The jury has decided the issue in favor of Doyle. The "law of the case" doctrine now prevents us from reconsidering our prior conclusion and holding that Doyle could not have justifiably relied on the representation as a matter of law.

Appellant argues that the specific issue of what constitutes "justifiable reliance" was not argued in the initial appeal. The short answer to this argument

is that it is irrelevant, since the court explicitly found a genuine issue of material fact with regard to reliance. Furthermore, on the initial appeal the parties did debate whether Doyle had relied on any representations by Myers. See Brief of Appellee at 16-17, Borg-Warner Leasing, 733 F.2d 837. Borg-Warner could have and should have raised any arguments as to the legal sufficiency of Doyle's reliance on the representations during the initial appeal.

None of the exceptions to the application of the law of the case doctrine, see, Wheeler, 746 F.2d at 1440, exist here. The trial of the case did not present any new evidence as to the terms of the guaranty agreement or Doyle's testimony. There has been no change of law which would cause us to depart from the findings and conclusions in our initial determination, that the

question of Doyle's reliance raised a genuine issue of material fact, was clearly erroneous and would work a manifest injustice if not reconsidered.

The district court orders denying Borg-Warner's motions for directed verdict and judgment notwithstanding the verdict are

AFFIRMED.